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Neutral Citation Number: [2018] EWCA Crim 2660

Case No: 201704801/B2 & 201704802/B2

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Tuesday, 20 November 2018

**B e f o r e:**

**LORD JUSTICE FLAUX**

**MRS JUSTICE CARR DBE**  
**HIS HONOUR JUDGE PICTON**  
**(Sitting as a Judge of the CACD)**

**R E G I N A**

**v**

**LEVI LEMON**  
**REECE EFFER**

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London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand  
Writers to the Court)

**Miss J Smart** appeared on behalf of **Lemon**

**Miss F Clegg** appeared on behalf of **Effer**

**Mr R Partridge** appeared on behalf of the **Crown**

**J U D G M E N T**

(Approved)

LORD JUSTICE FLAUX:

1. On 26 September 2017 in the Crown Court at Isleworth, following a trial before His Honour Judge Robin Johnson and a jury, these appellants, now both aged 19, were convicted of attempted robbery. On 6 November 2017, Lemon was sentenced to 12 months in a young offender institution suspended for 18 months, with 200 hours' unpaid work. Effer was sentenced to 15 months in a young offender institution suspended for 18 months, with 250 hours' unpaid work. They each appeal against conviction on one ground for which leave was given by the single judge. That ground is that the judge erred in failing to leave to the jury in the case of Effer an alternative count to robbery of assault, thereby rendering the convictions unsafe. Other grounds for which leave was not given by the single judge have not been renewed.
2. The essential circumstances of these offences were as follows. On the evening of 1 December 2016, Mr Pranay Sharma was walking home from work at about 11.30 at night when he was involved in an incident with a group of men which included the appellants. Mr Sharma called the police and gave an account of being punched by the appellants and of an attempt having been made to demand his property. He accepted that he had thrown punches during the incident.
3. The prosecution case was that the appellants had been part of a group of men who had surrounded Mr Sharma and attempted to rob him. They relied upon the evidence of Mr Sharma, CCTV footage which showed some of the incident, the fact that it was Mr Sharma who called the police and, in the case of Effer, his failure to mention in interview matters he now relied upon in his defence case.
4. The case for both appellants was that having walked into Effer, Mr Sharma had refused to apologise and become aggressive. Effer accepted that he had struck Mr Sharma but said

that he had done so after Mr Sharma struck him. Lemon contended that he was a peacemaker and tried to diffuse the situation. At some point an unknown man who was not part of their group had placed Mr Sharma in a headlock. There had been no attempted robbery. Both appellants were of previous good character.

5. The issues for the jury were thus whether there had been any attempt to rob Mr Sharma and whether Lemon had been party to any criminal behaviour at all.
6. The key aspects of Mr Sharma's evidence were as follows. On his way home from work he had heard a number of men running after him. He stopped and they asked him for weed. He said he did not have any, at which point they asked for his wallet, headphones and phone. One man was short and black with dreadlocks and the other tall and white with a white shirt. Initially he pushed them away but the black man became angry and punched him. He was surrounded and fell to the ground. He stood up and then the white man hit him. Another man told him to go home, which he tried to do, running to the other side of the road where the fight began again. One man had tried to befriend him but also tried to take his property. He pushed and punched both men. He said the men were bullying him. He told them that he had nothing valuable. He had not thought they were going to steal from him. There had been no shouting or arguing before the white man hit him. He had hit them in self-defence. They tried to grab his bag and his phone. He then ran into the closest shop and made a 999 call to the police. The men followed him. He subsequently identified the appellants as his attackers.
7. In cross-examination, he said that there was no question that he had collided with the man in the white shirt. There had not been an argument about this. He had only arrived in the United Kingdom four months earlier. He had been afraid during the incident and wanted to run away. He said he had been hit by the black man first. It was put to him

that although in his statement he said that he had been pushed to the ground and hit to the head that had not happened. He was sure that he had been hit to the ground. This was not shown in the CCTV footage. It was put to him that there was no footage of him being kicked and punched and that his account lacked detail. He said in response that this had been his first ever experience of a crime.

8. PC Daby who attended the shop gave evidence of arresting the appellants initially for assault. Lemon said his friend had been assaulted by an Asian man who was in the shop. Effer confirmed this. He appeared intoxicated. Mr Sharma gave an account of the officer of men running behind him and asking for weed. Effer had punched him to the side of the face and Lemon had also punched him and he had punched back.
9. Both appellants gave evidence. Lemon was now an undergraduate and he came from a respectable family. He had been out at a late 18th birthday party for Effer who was a close friend. He was not drunk and they had left at about 11.30. Effer was walking slightly ahead and suddenly turned round and approached Sharma. He was clearly angry. Lemon ran over to check everything was all right and heard Effer demanding an apology. Sharma said he had done nothing wrong and had been running for a bus. Lemon tried to tell him to go home but he seemed confused and the exchange became heated. The only reference to drugs had been Lemon telling Sharma he smelt of weed. Nothing physical had happened. He had said: "Don't mind my friend he's drunk." But Sharma had become aggressive and pushed him. He did not react. A man had appeared who was not in their group and frog-marched Sharma to the corner of the road. Sharma had punched both Effer and himself. They ended up on the floor and had been helped up by their friends. Sharma had run off. Lemon had given a prepared statement in interview but he had been advised thereafter to go no comment.

10. In cross-examination, he said he was the peacemaker. His group had not surrounded Mr Sharma, or asked him for drugs or his property and he had had plenty of opportunity to run for his bus or to walk off.
11. In evidence Effer said that he had been a bit tipsy at the time of the incident. Sharma had walked straight into him. He had wanted an apology and he lost his temper a little. He said the CCTV began immediately after the collision. Sharma had been aggressive. Cannabis had not been mentioned. No one had patted down Sharma, demanded his phone or tried to take it. He also described the man who was not part of their group taking Sharma into the corner of the road. The incident had continued over the road. Sharma had punched him in the face. His friends told Sharma to stop and asked him to go. When he was arrested he asked what property but he had not answered questions in interview on the advice of his solicitor. The group had not pushed Sharma against the wall or surrounded him. Others had been trying to diffuse the situation. Sharma had pushed him and he (Effer) had punched him but had not done so again despite Sharma punching both the appellants.
12. On behalf of Effer, Ms Clegg, who was not trial counsel, submitted that Effer had admitted assault at an early stage and been prepared to plead to common assault, but this had been rejected by the CPS. She submitted that Effer had also admitted assault during his evidence. Mr Sharma's evidence also supported this being no more than an assault, in that he had said it did not feel like an assault, it felt like a robbery. The CCTV footage was also consistent, she said, with assault. She submitted that in these circumstances the judge should have left an alternative count of assault to the jury. She relied upon the decision of the House of Lords in *R v Coultts* [2007] 1 Cr.App.R 6, particularly the passage in Lord Hutton's speech at [61] and [62]. She submitted that the

alternative count here was clearly suggested by the evidence so should have been left to the jury and that, in circumstances where that was not done, the conviction was rendered unsafe.

13. Similar submissions were made by Ms Smart on behalf of Lemon. She submitted that the reason why, if the lesser offence is not left to the jury in the alternative, the conviction is unsafe is that the jury was faced with disgraceful conduct by Effer, but may have found it difficult to acquit and so have convicted him of the more serious offence out of a desire that the defendant should not get off scot free. Here, if there had been such an alternative count for Effer, he could have pleaded to it and the jury would then have been sure that he would be punished for his violence. Whilst her client Lemon would not have been on that count, the case against him was that he was a secondary party to Effer's actions, joining in a joint enterprise, so that if the conviction against Effer was unsafe, by extension so was that against Lemon. She submitted that this was one of those cases where the jury had been left with a stark choice of either letting Effer get away with violence in the street or interpreting what they saw on the CCTV footage as an attempted robbery involving both appellants.

14. *Coutts* was considered by this Court in *R v Foster* [2008] 1 Cr.App.R 38, upon which Mr Partridge on behalf of the prosecution relies. Perhaps of more assistance in that context is the decision of this Court in *R v Hodson* [2009] EWCA Crim. 1590. Keene LJ giving the judgment of the Court considered *Coutts* and *Foster* and said this at [10] and [11]:

"10. We bear in mind the commentary on *Coutts*, which is contained in this court's decision in *R v Foster* [2008] 1 Cr App R 38. There is no automatic requirement on a judge to leave an alternative verdict if such a verdict would not properly reflect the facts of the case, when judged realistically, or would not do justice to the gravity of the case. This court stressed that whether it is necessary to leave such a verdict, even when legally available as an

alternative, will depend on the facts of the individual case. But if it is a realistically available verdict on the evidence, as an interpretation properly open to the jury, without trivialising the offending conduct, then it should be left.

11. It is, in our view, particularly important that this is done where the offence charged requires proof of a specific intent and the alternative offence does not. Even then there may be circumstances where the issue of specific intent does not truly arise. For example, if a man is shot at point-blank range in the head and the defence is simply that the defendant was not present, there is no requirement on the judge then to leave the alternative of manslaughter by way of killing without the necessary intent for murder. However, there will be cases, as *Coutts* recognised, where it is necessary to leave the lesser offence as an alternative to avoid the dangerous situation where the jury is faced with the stark choice of convicting for the serious offence or acquitting altogether. That may give rise to a miscarriage of justice."

15. That passage was applied and followed by this Court in *R v Johnson* [2013] EWCA Crim. 2001, and more recently in *R v Robinson* [2018] EWCA Crim. 149. In our judgment, the passage is particularly apposite in the present case. An alternative verdict of common assault, in effect no more than some pushing and shoving and punching in the street, following some accidental contact between Mr Sharma and Effer, is not borne out by the prolonged incident which can be seen on the CCTV footage which we have viewed. On any view the punch which Effer would have admitted amounted to assault took place some minutes after the commencement of the incident, at the stage when the group of men had moved closer to the edge of the road. Common assault as an alternative verdict would not only not have reflected what can be seen on the CCTV, but would not properly have reflected the facts of the case or done justice to the gravity of the case which was alleged to have been a joint attempt at street robbery by the appellants acting together, demanding Mr Sharma's property from the outset. In the circumstances of this case, we do not consider that the judge was obliged to leave the alternative count of common assault to the jury.

16. We also note that although both appellants now complain that the alternative count was not left to the jury, neither counsel raised this issue with the judge before or during his summing-up or submitted that he should leave an alternative count. As this court emphasised in *Hodson*, at [16], it was their duty to do so if it was a realistic alternative:

"We cannot conclude this judgment, however, without emphasising the duty upon counsel, at a trial such as this, to ensure that they raise with the judge, if he has not raised it of his own volition, the need at least to consider the propriety and necessity of leaving an alternative verdict such as section 20 to the jury if it is available on the facts. Particularly where there has been a fairly recent House of Lords' decision such as *Coutts*, it is the duty of counsel to draw such matters to the judge's attention to ensure that things do not go wrong, as they went wrong in this case."

17. The fact that counsel did not raise this alternative count with the judge suggests either a tactical decision not to do so or that it did not occur to counsel that it was a realistic alternative and this is an after-thought.

18. Of course there may be cases where in the light of questions from the jury the judge may have to revisit his or her decision not to leave an alternative count - a point made by Sir Igor Judge P in giving the judgment of this Court in *Foster* at [61]:

"... not every alternative verdict must be left to the jury. In addition to any specific issues of fairness, there is what we shall describe as a proportionality consideration. The judge is not in error if he decides that a lesser alternative verdict should not be left to the jury if that verdict can properly be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case. He must, of course, reconsider any decision he may have reached about alternative verdicts in the light of any question which the jury may see fit to ask ...

The judgment whether a 'lesser alternative verdict' should be left to the jury involves an examination of all the evidence, disputed and undisputed, and the issues of law and fact to which it has given rise. Within that case specific framework the judge must examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an

unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the judge enjoys 'the feel of the case' which this court lacks. On appeal the problem which arises is not whether a direction in relation to a lesser alternative verdict was omitted, and whether its omission was erroneous, but whether the safety of the conviction is undermined."

19. However, this is not such a case. As Mr Partridge rightly points out, there were no questions from the jury here which could be interpreted as demonstrating that they were struggling with a "stark choice" between convicting of attempted robbery and acquittal, such as that they were considering some middle ground which more accurately reflected the appellant's perceived criminality. They delivered timely and unanimous verdicts. In our judgment, there was simply no such stark choice here, and no question of fairness requiring that this alternative count, which did not reflect the gravity of the case and the totality of the evidence, be left to the jury. The summing-up was fair and balanced. The legal directions were correct and the convictions were safe. These appeals against conviction are dismissed.

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